UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

HEALTHSHARE, INC. d/b/a NORTHERN MICHIGAN REGIONAL HEALTH SYSTEM[1]

Employer

and **Case GR-7-RC-22854**

LOCAL 406, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO[2]

Petitioner

APPEARANCES:

Donald H. Scharg, Attorney, of Bloomfield Hills, Michigan, for the Employer
Ted Iorio, Attorney, of Grand Rapids, Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[4]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] The name of the Employer appears as amended at hearing.
[2] The name of the Petitioner appears as amended at hearing.
[3] The parties filed briefs, which were carefully considered.
[4] For the reasons set forth below, the hearing officer properly refused to admit testimony as to whether certain strikers have been permanently replaced, and, if so, which strikers remain eligible to vote.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer operates an acute care hospital at a combined facility in Petoskey, Michigan. On February 14, 2002, in Case GR-7-RC-22078, the Petitioner was certified as the collective bargaining representative of the Employer's full-time and regular part-time registered nurses. On November 14, 2002, unit employees went on strike. The strike continues to this date. Pursuant to decertification petitions filed in Cases GR-7-RD-3395 and GR-7-RD-3415, another election in the unit was held in October 2003. The Petitioner won the election and was certified a second time on December 11, 2003. On December 14, 2004, the Employer withdrew recognition from the Union, assertedly based on an employee petition signed by a majority of employees in the unit expressing their nonsupport of the Petitioner. The withdrawal of recognition has not been challenged by the filing of an unfair labor practice charge. This petition was filed on March 15, 2005.

The sole issue in this case involves a ruling made by the hearing officer. At hearing, the Employer wanted to litigate the eligibility status of the strikers. It contended that most had been permanently replaced. The hearing officer precluded testimony on that issue. He allowed the Employer to make an offer of proof. I affirm the hearing officer's ruling.

For 57 years, the Board's well-established, consistent policy provides for the resolution of striker and striker replacement eligibility issues by post-election challenge procedure. ***The Pipe Machinery Co.***, 76 NLRB 247 (1948). The policy is so inherent that sometimes it has been referred to as ***The Pipe Machinery*** doctrine. ***Eastern Camera and Photo Corp.***, 140 NLRB 569, 576 (1963); ***Neville Foundry Co.***, 122 NLRB 1187, 1190 (1959); ***Hertner Electric Co.***, 116 NLRB 979, 980 (1956). The policy has been reaffirmed many times. ***Universal Manufacturing Co.***, 197 NLRB 618 (1972); ***Milwaukee Independent Meat Packers Association***, 223 NLRB 922, 923 (1976); ***Mariah, Inc.***, 322 NLRB 586, 587-588 (1996). The Board even reversed a Regional Director who made a determination on the eligibility of strikers after the hearing officer had rejected the taking of evidence on the issue. The Board held that the issue would be resolved by the challenge ballot procedure. ***Safeway Trails, Inc.***, 224 NLRB 1342, 1343 (1976).

The Employer relies on certain language in ***Universal Manufacturing Co.***, supra, to support its argument that the eligibility issues must be resolved in a pre-election hearing. Specifically, it cites to where the Board stated, "…as it is not clear how many individuals are involved or whether the votes of the replaced strikers can affect the results of the election and as the Board usually does not resolve eligibility questions of this type unless the ballots are determinative…" ***Id.*** From that quote, the Employer contends that the Board held that a pre-election hearing must be held on striker eligibility when the employer presents evidence that the number of challenged votes is determinative. The Employer argues, based on its offer of proof, that it has established the number of individuals involved and that the votes could affect the results of the election.

The Employer is wrong. The Board in ***Universal Manufacturing*** did not hold that a pre-election hearing on the issue is required. First, the Employer either ignores or misinterprets the second portion of the Board's quote that it relies upon: that the Board does not usually resolve these eligibility issues unless the ballots are determinative. That means that the Board usually resolves such issues in post-election proceedings; not that it will require those issues to be resolved in pre-election proceedings if a party demonstrates that the challenged ballots will be determinative. As noted, that has been the Board's policy for over half a century, including in cases decided since ***Universal Manufacturing***. See, ***Safeway Trails, Inc.***, supra (the Board did not require a pre-election hearing where the number of possible challenged strikers, 184, could clearly have been determinative). Second, the Employer has not established the number of individuals who are involved. In its offer of proof, the Employer contended that the replacements it has hired since the onset of the strike are permanent and that it has a total complement of 377 permanent unit employees. However, its offer of proof also noted that it employs 31 temporary replacements. Further, the Petitioner asserted that the Employer has more than 50 unit positions posted as vacant. Thus, even assuming the employees hired since the strike began are permanent replacements, many questions remain as to the eligibility of the strikers. Third, while the number of challenged ballots could affect the results of the election, that likely was true in most, if not all, of the cases in which the Board deferred ruling on these types of eligibility issues.

In support of its argument that a pre-election ruling on striker eligibility is required, the Employer also cites to various sections of several Board publications. It contends that the hearing officer ignored Section 101.20(c) of the Board's Statement of Procedures, Sections 102.64(a), and 102.66(a) of the Board's Rules and Regulations, and Sections 11181 and 11188 of the NLRB Casehandling Manual dealing with the conduct of hearings. It asserts that by going ahead with the election, the Region will be ignoring Section 11084.3 of the Casehandling

Manual regarding the guideline of not approving election agreements if it is known that more than 10 percent of voters will be challenged. A similar argument regarding the requirements of the Board's Statement of Procedures and Rules and Regulations was rejected in ***Mariah, Inc.***, supra at 586-587. As to the guideline regarding the percent of challenged ballots, the section of the Casehandling Manual cited goes on to state that the guideline may be exceeded if the Regional Director deems it advisable to do so. While I recognize that more than 10 percent of the voters may be challenged, I deem it advisable to proceed.

Finally, the Employer asserts that a decision not to allow litigation of the striker eligibility issue is prejudicial to the Employer, employees and community. It argues that following the election, it will be embroiled in litigation during the entire 12 months of the election bar rule of Section 9(c)(3) of the Act and will be in a state of legal limbo, with the prospect of making any unilateral changes at its own peril. It contends that striking nurses should know before the election whether their votes will be counted. While it is recognized that the election results may not be determinative immediately following the election, these arguments are not sufficient to overcome the Board's longstanding, well-reasoned policy regarding deferral of this issue to post-election proceedings.

The Board's policy on this issue is well-settled. There are no reported cases where the Board has reversed a ruling that precluded the taking of testimony at a pre-election hearing on the eligibility of strikers. The hearing officer's ruling is affirmed. The striking employees may vote subject to challenge.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[5]

> All full-time and regular part-time registered nurses, including team leaders, nursing educators, psychoeducation specialist, hospice RNs and the Living Room RNs, employed by the Employer at or out of its combined facility located at 416 Connable, 1 McDonald Drive and 1080 Hager Drive, Petoskey, Michigan; but excluding all casual employees, guards and supervisors as defined in the Act, and all other employees.

[5] The parties stipulated to the appropriate unit.

Those eligible shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 20th day of April 2005.

(SEAL)

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

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LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **April 27, 2005.** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by **May 4, 2005.**

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.